STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition of **MELVIN AND SHIRLEY SCHREIBER** for Redetermination of a Deficiency or for Refund of New York State Personal Income Tax under Article 22 of the Tax Law for the Year 1998.	DETERMINATION DTA NO. 819582

Petitioners, Melvin and Shirley Schreiber, 16 Green Drive, Roslyn, New York 11576, filed a petition for redetermination of a deficiency or for refund of New York State personal income tax under Article 22 of the Tax Law for the year 1996.

A small claims hearing was held before James Hoefer, Presiding Officer, at the offices of the Division of Tax Appeals, 400 Oak Street, Garden City, New York, on June 23, 2004 at 9:15 A.M. Petitioner Melvin Schreiber appeared *pro se* and also for his spouse. The Division of Taxation appeared by Mark F. Volk, Esq. (Susan Parker).

The final brief in this matter was due by July 23, 2004 and it is this date that commences the three-month period for the issuance of this determination.

ISSUE

Whether the Division of Taxation properly denied petitioners' claim for refund for 1998 on the basis that the claim was filed after the statute of limitations for refund had expired.

FINDINGS OF FACT

1. During the years 1983, 1984 and 1985 petitioner[1] Melvin Schreiber received certain benefits as an employee/shareholder of a professional service corporation which was organized under Article 15, or authorized to do business in New York under Article 15-A, of the Business Corporation Law. As relevant to this proceeding, these benefits included certain contributions made by the professional service corporation on petitioner's behalf to a pension plan. Although the professional service corporation's contribution to the pension plan resulted in no taxable income to petitioner for Federal income tax purposes for the years 1983, 1984 and 1985, this was not the case for New York State income tax purposes. Pursuant to Tax Law § 612(b)(7) petitioner was required to include in New York adjusted gross income a portion of the pension plan contribution made each year by the professional service corporation on his behalf. Accordingly, petitioner paid New York State income tax on the amounts required to be added to New York adjusted gross income pursuant to Tax Law § 612(b)(7) for the years 1983, 1984 and 1985.

2. Since a portion of the pension plan contributions made by the professional service corporation on petitioner's behalf were taxed by New York at the time the contributions were made, Tax Law § 612(c)(12) allowed a taxpayer, who in later years received a distribution from the pension plan and included same in Federal adjusted gross income, to reduce Federal adjusted gross income by the amount necessary to prevent taxation of amounts which were previously reported and taxed by New York State in prior years pursuant to Tax Law § 612(b)(7).

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[1] Petitioner Shirley Schreiber is involved in this proceeding solely as the result of having filed a joint income tax return with her spouse. Accordingly, unless noted otherwise, all references to petitioner herein shall refer to Melvin Schreiber.

3. Subsequent to 1985, petitioner rolled the amounts contributed by the professional service corporation to his pension plan into a traditional individual retirement account ("IRA"). There were no Federal or New York State income tax consequences as the result of petitioner's rollover of the pension plan contributions into a traditional IRA. In 1998 petitioner converted $469,267.69 of his traditional IRA to a Roth IRA and the taxable amount of this conversion totaled $220,946.72. Petitioner, pursuant to specific provisions of the Internal Revenue Code, was eligible and elected to spread the $220,946.72 taxable conversion amount over four years and therefore was required to include $55,236.68 ($220,946.72 divided by 4) in Federal adjusted gross income for each of the years 1998, 1999, 2000 and 2001.

4. Petitioner personally prepared both the Federal and New York State personal income tax returns for the years 1998, 1999, 2000 and 2001, and he included in income on both the Federal and State returns $55,236.68 of taxable pension income for each of the four years as the result of the conversion of the traditional IRA to a Roth IRA. In early 2003, petitioner realized that, for New York State income tax purposes, a portion of the $55,236.68 reported as taxable pension income on his State income tax returns for 1998, 1999, 2000 and 2001 was not taxable pursuant to Tax Law § 612(c)(12) as he had previously paid tax to New York on a portion of this income when he made the Tax Law § 612(b)(7) modifications on his 1983, 1984 and 1985 State income tax returns.

5. On or about February 15, 2003, petitioners filed amended income tax returns (Form IT-201-X) for the years 1998, 1999, 2000 and 2001 with the Division of Taxation ("Division") reducing reported New York adjusted gross income by $13,827.00 for each year. The $13,827.00 reduction in New York income for each year represents the Tax Law § 612(c)(12) subtraction modification for the portion of the $55,236.68 taxable pension income from the

conversion of the traditional IRA to the Roth IRA on which New York State tax had been previously paid.

6. The Division granted petitioner the refunds as claimed on the 1999, 2000 and 2001 amended tax returns. By letter dated July 21, 2003, the Division denied petitioner the $873.00 refund sought on the 1998 amended return for the following reasons:

> The New York State Tax Law does not permit us to allow the refund or credit claimed on your return(s).
>
> The Tax Law provides for the granting of a refund or credit if the request is filed within three years from the time the return was required to be filed or within two years from the time the tax was paid, whichever is later.
>
> Our records show the return on which you requested a refund or credit was filed beyond the statute of limitations as prescribed by the Tax Law.

7. Petitioner's New York State income tax return for 1998 was filed timely on or before April 15, 1999. On said return petitioner reported New York adjusted gross income of $74,297.00 and a total New York State personal income tax liability of $2,372.00. The tax liability of $2,372.00 shown as due on the return was paid via estimated tax payments totaling $2,361.00 and an $11.00 payment which accompanied the return.

SUMMARY OF PETITIONERS' POSITION

8. Petitioner has advanced several arguments to support that he is entitled to the $873.00 refund as claimed on the amended return for 1998. First, petitioner points to the instructions for filing amended returns wherein it is stated that "[G]enerally, Form IT-201-X must be filed within three years of the date the original return was filed or two years of the date the tax was paid, whichever is later." Petitioner asserts that the use of the word "generally" strongly suggest that there is latitude in the application of the three-year statute of limitations for refund and that the

facts of this case mandate the exercise of this latitude. Specifically, petitioner notes that this is not a case where he forgot to take a deduction he may have been entitled to claim, but instead represents the payment of taxes to New York twice on the same income. Petitioner argues that the Division should have developed and implemented a form similar to Federal Form 8606, which tracks the status of nondeductible IRAs, to establish a paper trail detailing the portion of the pension income on which New York State tax had been previously paid by virtue of Tax Law § 612(b)(7).

9. Petitioner also maintains that the taxable portion of the IRA distribution was allocated over four years, i.e., 1998 to 2001, and that the tax due on the distribution was not completed until April 15, 2002 when the 2001 tax return was filed. Since petitioner's amended return for 1998 was filed on or about February 15, 2003, he argues that said claim for refund was timely filed within two years of the date the tax due on the distribution was completed, i.e., April 15, 2002.

CONCLUSIONS OF LAW

A. As relevant to this proceeding, Tax Law § 687, entitled "Limitations on credit or refund" provides as follows:

> (a) General. --- Claim for credit or refund of an overpayment of income tax shall be filed by the taxpayer within three years from the time the return was filed or two years from the time the tax was paid, whichever of such periods expires the later. . . . If the claim is filed within the three year period, the amount of the credit or refund shall not exceed the portion of the tax paid within the three years immediately preceding the filing of the claim plus the period of any extension of time for filing the return. . . . If the claim is not filed within the three year period, but is filed within the two year period, the amount of the credit or refund shall not exceed the portion of the tax paid during the two years immediately proceeding the filing of the claim. . . .

B. In the instant matter, there is no dispute that petitioner's claim for refund for the 1998 tax year was filed on or about February 15, 2003 and that this date is ten months beyond the date for the filing of a claim as provided for in Tax Law § 687(a). Petitioner attempts to circumvent the provisions of the law by arguing that the use of the word "generally" in the instructions for filing amended returns creates latitude in applying the provisions of the statute. This is simply not the case. Generally is defined in Webster's Ninth New Collegiate Dictionary as "in a general manner: as **a** : in disregard of specific instances and with regard to an overall picture **b** : as a rule : usually." Taxpayers usually have three years from the date the return is filed to submit a claim for refund unless they fall within one of the other specifically enumerated provisions of Tax Law § 687 which might extend the deadline for filing a claim for refund. Unfortunately for petitioner, none of the other specifically enumerated provisions of Tax Law § 687 are applicable to the facts of this case. It must be noted that the Division, once a return has been filed, generally has a like three-year period to issue a Notice of Deficiency to a taxpayer asserting that additional taxes are due, and therefore I see no inequity in the current statutory scheme which provides both parties with the same time frame. Both the Tax Appeals Tribunal, in ***Matter of Jones*** (January 9, 1997), and the Appellate Division, in ***Matter of Brault v. Tax Appeals Tribunal*** (265 AD2d 700, 696 NYS2d 579), have upheld the validity of applying the three-year statute of limitations for refund in cases with facts similar to those found in the instant matter. By establishing time frames for the issuance of notices of deficiency and the filing of claims for refund, the Tax Law provides both the State of New York and its taxpayers with the financial stability and security that comes from knowing that a specific tax year is closed.

C. While it is unfortunate that petitioner has paid income tax to New York twice on a portion of his pension income, such fact is insufficient to invalidate the clear mandate of the statute. In fact, Tax Law § 687(e) specifically provides that:

> Failure to file claim within prescribed period.--- No credit or refund shall be allowed or made, except as provided in subsection (f) of this section or subsection (d) of section six hundred ninety, after the expiration of the applicable period of limitations specified in this article, unless a claim for credit or refund is filed by the taxpayer within such period. Any later credit shall be void and any later refund erroneous. No period of limitations specified in any other law shall apply to the recovery by a taxpayer of moneys paid in respect of taxes under this article.

D. Petitioner's argument that his refund claim for 1998 should be allowed due to the fact that the Division did not provide a form to track the portion of his pension income which had been previously taxed is without merit. The instruction booklet for preparing resident income tax returns for 1998 clearly advises a taxpayer on page 20 of the need to make the Tax Law § 612(c)(12) subtraction modification that petitioner neglected to claim on his original return for 1998. By choosing to prepare his own return, petitioner, at the very least, must carefully read the instruction booklet which accompanied the return and he also takes the risk that he may inadvertently overpay his taxes by failing to properly claim all credits, deductions and modifications to which he may be entitled.

E. Finally, petitioner's assertion that the refund claim for 1998 was timely filed since the tax due on the distribution was not completed until April 15, 2002, when the 2001 tax return was filed, must also be dismissed. Although the conversion of the traditional IRA to a Roth IRA occurred in 1998, petitioner, pursuant to the applicable provisions of the Internal Revenue Code, elected and was permitted to report 25% of the taxable distribution in each of the years 1998, 1999, 2000 and 2001. Accordingly, petitioner's return for 1998 included 25% of the taxable distribution in income, and taxes were paid on this income for this year. I am not aware of, nor

has petitioner pointed to, any provisions in the Internal Revenue Code or Tax Law which support this argument.

F. The petition of Melvin and Shirley Schreiber is denied and the Division's Notice of Disallowance dated July 21, 2003 is sustained.

DATED: Troy, New York
September 16, 2004

/s/ James Hoefer
PRESIDING OFFICER